



King's Research Portal

DOI:

[10.22024/UniKent/03/fal.655](https://doi.org/10.22024/UniKent/03/fal.655)

Document Version

Publisher's PDF, also known as Version of record

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Cooper, D. (2019). A Very Binary Drama: The Conceptual Struggle for Gender's Future. *feminists@law*, 9(1), [655]. <https://doi.org/10.22024/UniKent/03/fal.655>

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

A Very Binary Drama: The Conceptual Struggle for Gender's Future

Davina Cooper*

Abstract

This article explores how both the present and change are imagined and enacted in relation to gender's conceptual future. Its jumping off point is the current British struggle over definitions of gender and sex, and how law and public policy should respond. Two contrasting conceptions have become particularly dominant within wider public discourse: gender as sex-based domination; and gender as identity diversity. The article explores the conceptual lines of friction and the part institutional arenas, particularly law reform debates, have played in shaping the dispute. In its second half, the article locates these conceptual lines in different conceptual tasks. Prefiguring, destabilising, and critiquing gender are all oriented to forging a different conceptual future for gender, but they also seem to rely on different conceptions of what gender means and involves. Arguing that concepts should be approached as invariably plural, rather than as subject to a single right definition, this article asks whether different conceptions of gender can interrelate in less antagonistic, more fruitful ways including in the development of statutory law. This article draws on utopian thinking to explore the challenge of gender's conceptual future.

Having surveyed utopian literature on gender over the first decade of this century, I am indeed struck by the absence of really new visions. But I am also struck by the continuing *desire for change*; the continuing desire to desist from old patterns of thought and behaviour (Sargisson 2012: 78).

* Research Professor in Law, Dickson Poon School of Law, Kings College London, UK. Email Davina.Cooper@kcl.ac.uk. This article is based on research conducted as part of the ESRC funded project, "The Future of Legal Gender", award number ES/P008968/1. I am very grateful to Robyn Emerton, Clare Hemmings, Didi Herman, Flora Renz, Mariana Valverde and the two anonymous readers for their helpful suggestions. This article has also benefited from comments made during its discussion at Edinburgh, Bristol and Sussex.

If our goal is to further feminist and queer political aims, we would do well to have both the strategies of gender proliferation and feminist redefinition and revaluation of womanhood operating at the same time. (Hale, 1996: 96)

Introduction

Utopian thinking today foregrounds the imaginary and material development of new worlds by invoking new desires, new forms of personhood and subjectivity, new relations, and new institutions (e.g., Levitas 2013). This article explores these themes in relation to gender's conceptual future, focusing on the struggles currently taking place in Britain to pin down what gender is, what it means, and what it could come to be. In doing so, it takes up a conceptual method anchored in the oscillating relationship between imagining and actualisation (Cooper 2014). In other words, approaching gender as a concept is not just about how gender is imagined or thought about; it is also about how gender is expressed and manifested; and even more about the ongoing movement between the two dimensions, as each informs, shapes, cuts, guides and gets folded into the other.

In recent years, the concept of gender has been radically shaken. While many publics in (neo) liberal jurisdictions continue to regard gender in conventional ways, gender's taken-for-granted status as the proper social life of natural binary sex has been unsettled. Various perspectives have emerged with an alternative account of gender – of what it is and what it does. Here, different politics (trans, queer, anarchist, postcolonial, socialist, radical, lesbian, etc) fuse with accounts of gender as, variously, a structure, system, performance, practice, language, labour relation and technological assemblage. But in among this rich variety of critical and progressive conceptions of gender, two formulations have become particularly prominent in contemporary Britain, emerging in the

course of law reform and public policy debates over gender transitioning and self-determination. One challenges gender's status as proper and natural, approaching it instead as a binary class relation of domination anchored in reproductive sex; a second, challenges gender as binary and biologically anchored, treating gender instead as a felt dimension and expression of the self that may -- or may not -- align with biological sex,¹ or even map onto intelligible male/ female forms. In this article, I take up these two competing conceptions as a spring-board to thinking about gender's contested present and future. This is not a single linear thread from now to what will be, but rather a cluster of different movements involving aspirations and fears, anticipatory practices, and critical framings of gender's "now". My discussion considers how to understand the conceptions of gender currently struggling for hegemony, and the tensions that exist between them. However, at its heart lies the question: can divergent conceptions of gender, developed for different tasks -- including to support minorities, maintain instability, and critique the status quo -- take on a more productive, less adversarial relation with one another?

Notions of conceptual conflict and plurality are not unfamiliar to scholars. There is Gallie's (1955) influential work on "essentially contested concepts";² Wittgenstein's work on "family resemblance"³ and "language games";⁴ Derrida's (1992, 2000, 2001) work on the relationship

¹ Feminists also question the notion of alignment on the grounds that suggesting gender can align with biological sex suggests sex is *already* gendered.

² Gallie (1955) developed the term to describe a conceptual situation in which appraisive concepts, signifying "some kind of valued achievement" (171), such as justice, democracy, or art, are subject to divergent "rival" understandings, definitions and usages that are also credible and genuine. Gallie's work has been subject to extension and critique, including over the boundaries and limits of which concepts can usefully be described as "essentially contested"; and over the conditions that generate their contestation (e.g., see Garver 1990; Reitan 2001).

³ "Family resemblance" applies to concepts where usages overlap to create a complex web of similar and related meanings, but where usages do not have a single shared essence (Wittgenstein 2009 [1953]; see also Haugaard 2010).

⁴ Here, meaning does not come from a unitary and stable definition but from knowing how to use a word; where uses of language are plural and unfixed. In this way, meaning varies according to the context and purpose of the "language game" (see generally Wittgenstein 2009 [1953]). According to Haugaard (2010), moving between a

between conditional and unconditional concepts (including the gift, hospitality and justice); and normative theory debates that assume possibilities for conceptual elasticity and divergence in arguing over whether concepts should be framed in ideal or non-ideal ways (e.g., see Hamlin and Stemplowska 2012; Valentini 2012). This article draws loosely from these different discussions. Working with a notion of concepts and “conceptual lines”⁵ that, importantly, fold in actualisation as well as imagining, what it primarily takes from these literatures on conceptual plurality are three key ideas. First, that ways of understanding and operationalising any particular concept are multiple and contested. How particular concepts are used, advocated for and understood depends, among other things, on the context and the purpose of their deployment.⁶ Rather than ask pre-emptively which conception is the right or best one, it is more useful to consider their different cuts and joins (material and interpretive), and so the implications different conceptions have for how social life is understood and lived. This also recognises that while different conceptions, for instance of gender, are tied to different political projects, conceptions can take on their own life as not-sensibly-to-be-disputed “facts”, particularly when they are taken up by powerful institutional bodies and processes.

Second, consistency and unity of use are not necessarily advantageous when it comes to thinking politically in both critical and optimistic ways. Derrida’s work on conditional and unconditional concepts, for instance, suggests that value may reside in keeping the relationship

discussion of what ‘is’ and what ‘ought to be’ involves a movement between language games. This resonates with the pluralist approach to concepts I have adopted (see Cooper 2014, 2017, 2019). For a helpful discussion of Wittgenstein’s ideas in relation to gender, see Nicholson (1994); on the value of plural, sometimes imprecise, conceptual boundaries, and emergent definitions, see Davidson and Smith (1999).

⁵ I use this term, “conceptual line” to describe the oscillating relationship between concepts’ imagining and actualisation through common or different temporal planes (see Cooper 2014). These two dimensions of imagining and actualisation do not converge; and it is, in part, the ongoing tension, pressure, and discrepancy between them that keeps concepts in flux.

⁶ See also Clarke (2015: 829-830) who suggests that identities might be “unbundled”; and so defined differently in different contexts.

between both poles in play rather than arguing for one to necessarily supersede the other (e.g., see Derrida and Dufourmantelle 2000). Everyday pragmatic or conditional conceptions identify what is done; idealised conceptions operate as an aspiration, a horizon of impossible possibility and a standard for evaluating what is. In this article, I am less concerned with the movement between the barely acceptable and the ideal, and more with how we might move between critical, exploratory and affirmative conceptions.

The third claim I want to take up suggests concepts' evaluative or normative dimensions form key stakes in how, why and whether a conceptual line is desirable. In the case of gender, this is complicated by the fact that views differ radically not only on what gender names, but also on what gender does, and thus the normative valence that should be attributed – in basic terms, whether gender identifies something positive (or natural) or something harmful.

Conflicts over conceptions of gender are far from new. The one taking place in the second decade of the 21st century is a successor to previous feminist conflicts over essentialism. Earlier debate arose as multiple forms of oppression became more adequately attended to within feminism, leading to debates over whether there was anything common or shared by the category of woman. While some writers and activists identified possible commonalities -- from reproductive potential to subordinated status and experiences -- others challenged this essentialism on empirical and normative grounds, with a third way emerging based on a "strategic essentialism".⁷ This third approach treated the category woman "as if" it had some core common meaning, while recognising this commonality explicitly as a politically constructed one. I return to the work performed by the "as if" later in relation to gender's prefiguration. One striking difference, however, with the earlier

⁷ For one account of this debate, see Stone (2004); for critique, see Munro (2006).

essentialism debate was that the normative borders of who should count as a woman were not, for the most part, up for grabs. Some feminists centred eroticised sex-based inequality in constructing the category of woman, generating the claim that lesbians weren't women since their lives were not defined by willing sexual subordination to men.⁸ But this was a process of self-executed category-exit rather than unwilling exclusion. It also intersected other moves, concerned to expose and overturn histories of denial that withdrew the status of woman from many thanks to racialized and socio-economic processes of symbolic and material exclusion (e.g., see Carby 2007). Previous debates about what it means to be a woman diverge, then, from the current conflict, which is foremost concerned with how expansively certain gender categories should be drawn. Today, the starting point is not what, if anything, do all those indisputably defined as women share; but how should the criteria of woman be defined so that certain identified groupings – most prominently trans women (or trans women who haven't undergone body modification) – get included or excluded (see also Ahmed 2016a: 30).

In Britain, in the later teen years of the 21st century, the conceptual conflict over gender has led two quite different accounts to come to political prominence: “gender as diversity” (GDiv) and “gender as domination” (GDom).⁹ While other accounts exist, these two became particularly influential within wider legal and policy debate.¹⁰ Indeed, their prominence was partly structured by this wider institutional focus, which shaped and supported certain discursive positions in contrast to

⁸ See Wittig (1992); also discussed by Hale (1996); Tudor (2019). See also MacKinnon (1987: 6) on gender “as the congealed form of the sexualization of inequality between men and women”.

⁹ GDom aligns with what has been described as a “gender critical” perspective; e.g., see Critical Sisters; <http://www.criticalsisters.co.uk/>; and the Socialist Feminist Network; <https://www.socfem.net/>; both last accessed 25 February 2019.

¹⁰ This became especially apparent in organisational and individual responses to the 2018 government consultations over reforms to the Gender Recognition Act 2004 in Scotland, and in England and Wales, as discussed below.

others. Both GDom and GDiv embrace a spectrum of positions. For instance, GDiv includes liberal perspectives that treat gender as a core stable part of personhood alongside more experimental, critically intersectional, and fluid approaches to gender. GDom includes conceptions of gender as a social relationship entirely, and by definition, constituted through domination. But it also includes conceptions of gender that are more equivocal about the constitutive and essential character of domination in relation to what gender is and could become.

Later, I discuss how liberal variants of each account gained prominence compared to more radical alternatives. However, one complication of GDom has been the growing dismissal or demotion of gender, as a critical term, by some women's rights activists on the grounds that gender has become overly aligned with a voluntarist and stereotypical approach to identity that ignores the "real", biological, unchosen sex-basis of women's oppression.¹¹ According to the influential radical feminist activist-scholar, Sheila Jeffreys (2014: 43), "The way in which queer and transgender activists use the term 'gender' is problematic because it obscures the existence of persons, women, who are biologically female, and their particular interests." This challenge to the ongoing validity of gender as a social and political concept is an interesting one for a discussion of gender's future. However, to the extent GDom feminists recognise those social processes that convert sex into gender (while rejecting, if tacitly, the feminist counter-claim that it is gender processes which give rise to discourses of sex), gender remains an important concept. Gender is also an important concept for progressive future-oriented politics since, unlike sex, it is not deemed a fixed, stable fact. In the struggle over the immediate terms and possibilities for self-determined gender, political

¹¹ See, for instance, Women's Spaces in Scotland, Response to Scottish Consultation on reforming the Gender Recognition Act 2004; <https://www.gov.scot/Resource/0053/00539506.pdf>; last accessed 25 February 2019. For an interesting account of the history of the term 'gender' which concludes by questioning its ongoing value for feminists, see Debbie Cameron, "A brief history of 'gender'", *Language: A feminist guide* blog, 15 December 2016; <https://debuk.wordpress.com/2016/12/15/a-brief-history-of-gender/>; last accessed 25 February 2019.

ambitions for the future have received less attention. But to the extent that advocates of both approaches want a future that is less unequal, can gender have a future? Should gender be abolished;¹² can it be organised in ways that are more equal and freer; what might gender then mean; and can (and should) the good life be cultivated against and away from androcentric norms? While these are normative questions, they are not only that; they are also conceptual questions, inextricably tied to the cuts and joins in how gender is imagined and done.

GDiv and GDom offer conceptions of gender that diverge in multiple ways. They diverge in what gender means, its subjectivities, constitution, relations, normative valence, histories, sought-after ends, and strategies for how to accomplish them. The capacity of gender to diverge conceptually is unsurprising. Within different contexts, attuned to different harms, desires and aspirations, gender acquires different meanings and uses (even as pre-existing meanings, usages and material relations shape the new ones that emerge). These different meanings and uses, arguably, could co-exist, sliding over each other, as they got taken up by different social populations. They could even remain comfortably unintelligible across different communities of usage, particularly if they remained relatively insulated, politically and socially, from each other. However, the capacity of different conceptions of gender to coexist, with seemingly mutual indifference, in divergent normative and social worlds has been undermined by a series of contact points, including the turn to law and state by different gender-based movements seeking recognition and remedial action.

In the section that follows, I explore in more detail the current struggle to shape gender's present and future meanings as law reform processes provide a stage for conflict, substantial

¹² See for instance, Jo Bartosch, "Feminists like me have a broader aim; we don't want more gender boxes to choose from; we want to get rid of the boxes altogether," in 'Lesbian pride, lesbian protest', 8 July 2018; <https://medium.com/@josephinebartosch/lesbian-pride-lesbian-protest-cea2c1404cc0>; last accessed 25 February 2019.

material and symbolic stakes, and an institutionalised bridge between what is and what should be. I then shift ground to locate GDom and GDiv within a broader field of future-oriented usages that underpin gender's conceptualisation: focusing on prefiguration, destabilisation, and critique in order to consider how these purposes affect the conceptual lines that develop; and the tensions that get engaged. Driving this discussion is the question of what to do with conceptual plurality. Political adversaries in the struggle over gender treat plurality as something to eliminate, hoping to gain victory for their paradigm over other contenders. But, there are other ways of approaching conceptual plurality. The relationship between divergent conceptions of gender, when it comes to material practice, has received insufficient attention in both theoretical and empirical work, including in sociolegal and gender studies. This article seeks to contribute to understandings of contemporary conflicts over gender; but as a case study of one particular conceptual conflict, it also traces an approach that can be taken up for other concepts too -- property, citizenship and the state for instance -- where progressive and critical perspectives tend to polarise into either critique or reconstruction.

Struggling for gender's conceptual future

Today, the conceptual assumption that there are two fixed and stable sex-based genders, with very limited traffic between them, no longer holds up. In different countries, governments have been amending their recognition laws. These have mainly focused on regularising and, in some cases, simplifying procedures for gender transitioning. However, in a few jurisdictions, including Canada, Malta, Denmark, California and Scotland, governments are also attending to the new (rather than traditional) claims of those who identify with a gender other than male or female (see Clarke 2019; Holzer 2018). Some countries have managed gender-transitioning law reform with minimal

opposition from other progressive/ critical gender movements. In other countries, the question of who gets to define and come within the category of woman (and to a lesser degree men), and whether new gender categories can and should be legally created, has precipitated a series of flashpoints, as clusters of feminist activists oppose any changes that would make the category of woman more permeable or expansive. These institutional flashpoints echo earlier ones. Feminist spaces and projects have a long history of membership tensions, one of the most famous being the Michigan womyn's music festival policy of excluding trans women's participation (see, e.g., Browne 2009; Gamson 1997). But community-based boundary-disputes have multiplied and hardened as state bodies and powers get involved.¹³

In Britain, disagreements over gender's conceptual parameters have grown increasingly heated (see also Ahmed 2016a). Social and mass media stories describe participants being subject to abuse, social media attack, no platforming, the closing down of meetings, and violence.¹⁴ Provision of puberty-blockers for transgender-presenting children and teenagers;¹⁵ and the de-sexing of public toilets (Jeffreys 2014) proved two focal-points for conflict. Clashes also broke out over the Labour Party's decision to recognise the right of any self-identifying women to apply for nomination to

¹³ See, for instance, the litigation in British Columbia, Canada, in *Vancouver Rape Relief Society v. Nixon* [2003] BCSC 1936; [2005] BCCA 601. In this case, a trans woman was denied access to volunteer peer counsellor training at the feminist organisation, Rape Relief, on the grounds she had been raised male and so had not been oppressed as female from birth.

¹⁴ E.g., see Sophie Hemery, 'Online platforms have enabled "deluge of hatred against trans women" in the UK', Open Democracy, 15 November 2018; <https://www.opendemocracy.net/en/5050/online-platforms-enable-deluge-hatred-against-trans-women-uk/>; last accessed 12 March 2019; also Jamie Doward, 'Women's groups claim 'silencing' on transgender concerns', The Observer, 14 October 2018; <https://www.theguardian.com/society/2018/oct/14/women-claim-intimidation-silencing-gender-recognition-act-debate>; last accessed 25 February 2019.

¹⁵ Tim Adams, 'Transgender children: The parents and doctors on the frontline', *The Guardian*, 13 November 2016; <https://www.theguardian.com/society/2016/nov/13/transgender-children-the-parents-and-doctors-on-the-frontline>; last accessed 25 February 2019.

women-only party posts and women-only parliamentary shortlists.¹⁶ But the conflict's gathering steam came to a head in Scotland, and in England and Wales, in 2018, when both governments consulted over whether to introduce a lighter-touch approach to gender transitioning given similar developments in other jurisdictions. The advancement of a self-declaration framework that would remove the need to establish "gender dysphoria", the two year "real life" test and other "intrusive" or demeaning requirements gained support from some feminist and women's organisations. However, others strenuously opposed it. As one organisation (Fair Play for Women) remarked, in response to the Scottish consultation on reforming procedures for gender transitioning, "Trans-ideology is the belief that the subjective concept of gender identity overrides the objective reality of bodily sex. ... This policy will codify this belief into law and prioritise this ideology over and above other widely held concepts such as the male and female sex binary."¹⁷

The conflict that has emerged painfully exposes the contested character of gender among progressive forces. To flesh out the tensions between gender as diversity (GDiv) and gender as domination (GDom), I start with the former. GDiv dominates the accounts of those arguing for self-determination on the grounds that gender forms a core part of identity.¹⁸ As expressed by the Yogyakarta principles, a set of aspirational international human rights, "gender identity" is "each

¹⁶ Paul Waugh, "'Self-defining' trans women to be allowed on Labour's all-women parliamentary shortlists", *Huff Post*, 6 March 2018; https://www.huffingtonpost.co.uk/entry/self-defining-trans-women-to-be-allowed-on-labours-all-women-parliamentary-shortlists-partys-nec-set-to-announce-equalities-committee_uk_5a9d94f4e4b0479c0255e9c2?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvLnVrLw&guce_referrer_cs=nLz8k7aIXGC3_lleLGNhrw; last accessed 25 February 2019; see also Josephine Bartosch, 'Labour's refusal to accept the definition of a woman', *The Spectator*, 11 September 2018; <https://blogs.spectator.co.uk/2018/09/labours-refusal-to-accept-the-definition-of-a-woman/>; last accessed 25 February 2019.

¹⁷ Response to the Scottish government consultation on the GRA; <https://www.gov.scot/Resource/0053/00539305.pdf>; last accessed 25 February 2019.

¹⁸ On self-determination-based approaches to gender, see Clarke (2015); Hutton (2017).

person's deeply felt internal and individual experience of gender".¹⁹ As such, gender constitutes a fundamental aspect of personhood: something people have a right to have and to express without being "subject to another's approval".²⁰ In liberal terms, it describes a process of developing self-realisation and coming to personhood.²¹ In more radical terms, gender self-determination also forms a terrain of creativity, choice, and sometimes experimentation, albeit one lived and structured by other social relations as well. But, in both liberal and more radical versions, the right for one's gender identity to be publicly intelligible, recognised, treated as mattering, and supported is emphasised (see Butler 2015: 35-39). Judith Butler (2004: 32) describes the harm that results from being treated as unreal and unintelligible; she talks of the impossibility of "persist[ing] (in my being) without norms of recognition that support my persistence". Witnesses in the 2015 parliamentary inquiry on transgender equality expressed similar views: "Non-recognition has ruined my life. I feel a shadow of the person that I could have been if I had been able to lead a normal life... [M]y whole life has just been a battle for the legitimate identity that other people can take for granted."²² "As a trans man, it was very, very important to me to get an 'M' on my birth certificate and on my passport. That helps validate my identity, and certainly for some trans people it can make the difference between somebody respecting who they are or continuing to misgender them."²³

¹⁹ <https://yogyakartaprinciples.org/introduction/>; last accessed 25 February 2019.

²⁰ See Stonewall Scotland's response to the Scottish consultation, which treats gender identity as part of the right to private and family life; <https://www2.gov.scot/Resource/0053/00539455.pdf>; last accessed 29 February 2019.

²¹ In some versions, the right to "have" a gender expresses a relationship that is propertied in its inflection, anchored in people's ownership of themselves. For discussion of self-ownership in relation to gender and feminism, see also Cooper and Renz (2016); Davies (1994); Hutton (2017); Naffine (1998).

²² Christie Elan-Cane, evidence to the Women and Equalities Committee, Transgender Equality Inquiry, 13 October 2015, HC 390, p. 32;

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.pdf>; last accessed 25 February 2019.

²³ James Morton, evidence to the Women and Equalities Committee, Transgender Equality Inquiry, 13 October 2015, HC390, p. 13;

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.pdf>; last accessed 25 February 2019.

As a descriptive and normative stance of gender's invariable diversity, GDiv is predicated on the harms that face those whose gender identity is deemed improper -- the micro-aggressions, discrimination and physical violence that people confront when their gender appearance is unconventional or when their legal and social gender diverge (e.g., see Chang and Chung 2015; Doan 2010; Lombardi et al. 2002; Spade 2011).²⁴ One non-binary respondent to the parliamentary inquiry into transgender experiences commented, "In various workplaces I have experienced constant and sometimes deliberate mis-gendering, laughing at my gender identity and undermining of my gender as 'over political,' 'not real' or 'over intellectualizing'. Because my gender identity is not recognized in law and policy, it is impossible to address these issues in the workplace."²⁵ Arguments over recognition and status reform have here taken two primary paths.²⁶ While some advocate greater legal recognition and institutional mirroring of people's lived gender identities (for instance, in legal documents), others seek to eliminate gender registration or legal gender status altogether,²⁷ on the grounds that dissident or minor gender identities would be better served by the state's withdrawal.

Advocates of GDiv emphasise gender freedom, fluidity, and self-determination. However, what gender *is* remains opaque. The international Yogyakarta principles tie gender to identity and expression (including mannerisms, dress etc). But while they recognise that identity and expression

²⁴ Also discussed, if less extensively, are the negative economic and workplace effects of transitioning (e.g., Schilt and Wiswall 2008). For an intersectional account of the ways transgender identity and class intersect in relation to the violence faced by trans female sex workers, see also Namaste (2009).

²⁵ Individual written submission to Women and Equalities Committee, Transgender Equality Inquiry, 18 August 2015; <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19360.pdf>; last accessed 25 February 2019.

²⁶ Whether recognition should include *institutional* recognition has led to divergent perspectives. Views differ on whether it is beneficial for the state to take up gender identities and, if so, in what contexts (e.g., see Shrage 2012; Wipfler 2016).

²⁷ For discussion of some of the implications of abolishing assigned legal gender status, see Clarke (2015); Cooper and Renz (2016); Hutton (2017); Katyal (2017).

may not converge, what makes either one of *gender* is unspecified. In the re-fabrication of gender away from binary birth sex, what gender means in general, and what particular genders entail, remains little addressed. What does it mean, for instance, to express a specifically female identity, a male one, or neither? These identities or descriptions could acquire radically new meanings, but if gender and its categories are not to constitute a private language, excluding others on grounds of incomprehension, how are its terms to be intelligibly anchored?²⁸

Within the broad constellation of GDiv, different responses are offered. One conceptual approach retains stable and conventional notions of masculine and feminine, but recognises people may situate themselves between “binary” poles or mix and match masculine and feminine in novel and changing ways – where non-binary constitutes an identity rather than a politics of destabilisation as I explore further below (see also Holzer 2018). Nordmarken’s (2014: 39) autoethnography captures the complexity of this well: “I am becoming more masculine in shape and yet, more feminine in movement. I find myself embodying a certain femininity that I did not feel comfortable in, in movements before, when my body looked more female. Though my voice now is in male octaves, I am speaking more softly than I did. This is a masculine-bodied femininity.” Stachowiak’s (2017) discussion of people who identify as genderqueer also addresses questions of flexibility and gender-mixing. Yet, the research emphasises the importance of a “felt sense of gender” among the self-identified genderqueer people spoken with. Stachowiak’s (2017) participants identified “wobble

²⁸ See Gender Critical Greens, ‘Gender is not an identity, it is a tool of patriarchy: A feminist view of gender identity politics’, 15 August 2016: “Any attempt to define female other than by biology inevitably resorts to gender stereotypes, so all references by this ideology to ‘being female’ or ‘feeling like a woman’ are based on such socially-constructed ideas as wanting to wear feminine clothing, play with dolls, wear makeup, do ‘girly’ things, and crucially not do ‘boy’ things.” <https://gendercriticalgreens.wordpress.com/2016/08/15/a-feminist-view-of-gender-identity-politics/>; last accessed 25 February 2019.

room” from being outside of defined, binary, gender “boxes” (540);²⁹ but, in the process, many also expressed largely conventional understandings of these boxes. Other conceptual lines, however, recognise, more explicitly, the problems of stabilising conventional gender terms (which are not necessarily destabilised by discourses of combination and crossing). Gender’s social intelligibility may come from existing discourse, but this does not mean gender meanings have to derive from *mainstream* notions of masculine/ feminine (see also Schippers 2007). Rejecting the notion of singular and unitary histories in gender’s meaning and cultures, dissident and minority gender histories -- of female masculinities (e.g., Halberstam 1998; Mackay 2019), for example -- come into view. In other cases, identification as agender or nongender constitutes a space for gender’s disavowal. This might seem to challenge the very framework of GDiv; yet, in contrast to a gender abolitionist perspective, identifying as non-gendered comes to function as one gender identity among others anchored in personal refusal. As such, it is about creating a space for those who identify outside of gender’s current classificatory terms rather than necessarily advocating politically for the destruction of these terms.

If GDiv identifies one emergent conceptual constellation struggling for hegemony, gender as domination identifies another. The notion that gender oppresses and renders people’s lives precarious is not exclusive to GDom. GDiv is centrally concerned with the injuries that people face who express “gender variant” identities, where violence and erasure confront those who live outside, or fail to meet, normative gender terms. Sara Ahmed writes (2016a: 32): “We can think of gender norms as places in which we dwell: some are more at home than others; some are unhoused by how others are at home.” GDom also concerns itself with gender policing and the experience of being

²⁹ See also response from Stonewall Scotland to the Scottish consultation on the GRA;
<https://www.gov.scot/Resource/0053/00539455.pdf>

“unhoused”, particularly for women who refuse their conventional social role. However, GDom, at least in the formulation presently prevailing, is primarily attuned to the harms that *normative* gender conduct generates. Violence, exploitation and men’s domination of women form gender’s constitutive core -- part of the normal, everyday, casually expected, and socially policed patterning of gender (or sexed) class relations. This, then, is a core distinction between the two conceptions: in one, gender harms primarily confront those who live non-normative lives; in the other, gender harms primarily confront those who live subordinate lives, where being subordinate is integral to the normative harms encountered. Or, to put it another way, GDiv foregrounds the right to have a gender, whereas GDom foregrounds the rights and freedoms some people lose because of the gender that they have. Sheila Jeffreys (2014: 43) writes: “Women do not adopt the identity of being women, but rather possess female biology and on this basis are reared in a subordinate relation to men.”

GDom’s analysis is a relational one. While it focuses on domination as gender’s central relational feature, it also recognises relationality in three other respects: that what being a woman or man means comes through relations and interactions with others;³⁰ that one’s own particular gender is determined by and dependent on others’ recognition (and treatment); and that gender characteristics are constituted relationally in the sense that, within a binary scheme, each gender is assumed to be an inversion of the other. As one women’s organisation wrote, responding to the Scottish consultation on reforming the GRA: “Gender is a set of stereotypes based on sex. It is a hierarchy which places women in a box marked weak, submissive, maternal, emotional and men in a

³⁰ See also Connell and Messerschmidt (2005); Fenstermaker and West (2013) on different dimensions of gender’s relational and interactive character.

box marked strong, aggressive, dominant.”³¹ At the same time, they continue: “No individual conforms to these stereotypes, we are neither barbie nor action man.”³² For GDom, these dimensions of relationality are interconnected: what it is to be a woman is defined by the presumed lack of male-associated qualities, where being a woman is to be perceived and treated as a woman, and where one becomes a woman through a complex mix of relational processes (see also Schippers 2007). Yet, these relational processes are underpinned by biology. GDom presents an explicitly materialist framework against the idealism which GDiv is dismissed as bearing, and the female body is deemed the incipient material form causing women to be oppressed:³³ “Sex is the scaffolding upon which gender roles are constructed.”³⁴ Through this structure of biology plus socialisation, women constitute a formation with class-based interests -- proletarianised as an exploited, dominated, and vulnerable class thanks to “real” physical relations. Violence, child-birth and sexual exploitation are the material practices that ground women’s vulnerability. And in this emphasis on biologically-rooted social and physical experiences, little accounting space is left for language, meaning and affect. As one responding organisation to the Scottish consultation remarked, “sex isn’t about how one identifies or feels, but is an objective, verifiable fact. ... The law needs to reflect the material reality of people’s lives. Regardless of how a person identifies, if she is female, she is at risk of male violence, of discrimination in the workplace etc. on the basis of biology, not feelings.”³⁵

³¹ Women’s Spaces in Scotland, response to the Scottish Consultation on the GRA; <https://www.gov.scot/Resource/0053/00539506.pdf>; last accessed 25 February 2019.

³² Ibid.

³³ This conception of sex/ gender has been extensively criticised by feminists for some decades for ignoring the complex character of women’s inequality and domination, including the part played by capitalism, racial classifications and colonialism (e.g., see Carby 2007; Lugones 2007).

³⁴ Socialist Feminist Network, ‘On not being allowed into leftist spaces’, 6 June 2018; <https://www.socfem.net/2018/06/leftist-spaces>; last accessed 25 February 2019.

³⁵ Response from Women’s Spaces in Scotland, submitted to Scottish consultation on the GRA; <https://www.gov.scot/Resource/0053/00539506.pdf>; last accessed 25 February 2019.

Legal dystopia

The institutional arena of law reform provides a site where these competing conceptions of gender meet; but it is also more than that. In Britain, proposals to make changing one's sex/ gender status easier have intensified conflict, and provided many of its terms, as participants fight over what gender and sex mean in law, and how changes to the Gender Recognition Act 2004 will (or won't) affect interpretations of the Equality Act 2010.³⁶ Institutional sites of law reform and public policy have also affected the relative prominence of different strands within the two constellations. Thus, while one strand of GDom points hopefully to gender's (far off) abolition,³⁷ women's interests advocates focus on a less hopeful (nearby) future as they emphasise women's vulnerability and need for protection, including through activities and spaces which functionally separate men and women. The future presented here is a dystopic one where men claim femalehood, opportunistically seeking to pass as women in ways that jeopardise "real" women's safety and privacy.³⁸ The women's interest group, Fair Play for Women, describes how conflating gender identity and sex, so that "self-identification policies become the norm", will cause harms to women to "become common place. This is neither viable nor fair."³⁹ Toilets, changing rooms, girls' youth organisations, hostels, and

³⁶ For one attempt to clarify the relationship between the two legal frameworks, see EHRC, 'Our statement on sex and gender reassignment: legal protections and language', 30 July 2018; <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>; last accessed 12 March 2019.

³⁷ Some respondents to the Scottish consultation described their politics as "gender abolitionist"; e.g., see Lyons' Point Educational Coop response; <https://www2.gov.scot/Resource/0053/00539376.pdf>; last accessed 25 February 2019. For a review of academic discussion of "degendering", see Lorber (2000).

³⁸ See 'Sex self-ID and what it means for privacy, safety and fairness for women', *Fair Play for Women*, 8 September 2018; <https://fairplayforwomen.com/examples/>; last accessed 25 February 2019.

³⁹ Ibid.

prisons emerge as the dystopic terrain of women's vulnerability to enduring predatory male behaviour.⁴⁰

So far, this article has traced two conceptions of gender – conceptions that have become publicly prominent in Britain today. Both counter the conventional notion of gender as the natural-social life of binary biological sex. Without knowing, of course, what gender's conceptual future will be, these two contrasting conceptual lines provide possible and plausible ways of reimagining what gender is and means; but what should we make of their struggle to determine gender's truth – whether as a relation of class domination or as a form of diversity? To the extent that this is a struggle for exclusive definitional capture at the expense of other competing definitions, does it limit the contribution any one conception can make to the “better” society of progressive utopian yearning (e.g., Levitas 2013)? To address this question, I want to broaden my focus from gender as either diversity or domination to consider how different conceptions of gender get taken up for different purposes. GDiv and GDom map broadly onto gender affirmation and critique respectively. But there are other conceptions of gender that might also do this work. There are also other political tasks for the concept of gender. I therefore want to move beyond the binary of diversity/ domination as well as the binary of affirmation/ critique. Yet, rather than search for a single conception of gender to work effectively across multiple contexts and usages, I want to consider whether and how different conceptions of gender, oriented to different purposes, might fruitfully and interactively coexist. Addressing this is crucial for left gender and feminist politics that want to find ways of moving beyond the conceptual wars currently taking place. It is also crucial for a project of law reform that does not want to become cubby-holed or paralysed by incompatible

⁴⁰ See also Schilt and Westbrook (2015: 27) on the “gender panics” occasioned by conservative and other opponents of transgender rights, where “people react to a challenge to the gender binary by frantically asserting its naturalness”.

approaches. What follows are some tentative conceptual lines, drawing on a utopian method, attuned to materiality, plurality, disorientation, and present-futures.

Prefiguring gender

Prefiguration provides a helpful concept for thinking about how gender's imagined futures might materialise within the present.⁴¹ Challenging conceptions of man and woman as fundamentally descriptive, they become instead categories to take up and repurpose (see also Hale 1996: 105-6). Prefiguration thus goes to the heart of a conceptual approach that does not simply advocate for new gender meanings, but foregrounds their materialisation as well. What is enacted here, importantly, is also something more than a redrawing of group membership boundaries, e.g., who counts as a man. At stake also are different ways of understanding gender (including as relinquishable, plural, fluid, chosen etc.). I therefore want to think about the prefiguring taking place as a form of prefigurative *conceptualising* (see Cooper 2017) where dissident or minor meanings are taken up and enacted *as if* they were valid -- in contrast to a conceptual approach that merely fantasises, advocates for or desires them.

Prefiguring gender as if it means something beyond the contours of a conventional common-sense is not the preserve of a gender-affirming politics alone. Gender-abolitionist perspectives have also prefigured what gender might mean – acting, for instance, as if gender was something eliminable. Feminist protest communities, such as Greenham Women's Peace Camp combined the rejection of conventional feminine norms of presentation and capacity with an assumption of feminist norms anchored (at least for some) in self-identified women's-cultures of peace, caring, intergenerational responsibility and horizontal collaborative politics (Roseneil 2000).

⁴¹ On prefiguration, more generally, see Maeckelbergh (2011); Swain (2019); Yates (2015).

What is prefigured changes over time. An earlier generation of activists prefigured the shift from androcentric to gynocentric norms while also severing the taken-for-granted linkage between the sexed body and stereotypical masculine and feminine assumptions. This latter continues in contexts where people treat the social fabric “as if” it can make room for diverse non-hetero-normative (if sometimes heterosexual) ways of living: men as primary child-carers, women in manual trades, lesbian, gay, queer, polyamorous households.⁴² However, the form of prefiguration currently receiving attention is rather different (although it also sometimes combines with these other forms). Its central premise is the notion that *intelligible* genders, disarticulated from birth sex, can be combined and mixed; where genders are (potentially) transient, multiple, and changing – both in themselves and in their relations, connections and overlap with each other (see also Linstead and Pullen 2006; Mackay 2019; Stachowiak 2017). Today, these moves are largely associated with genderqueer, non-gendered, trans, intersex and other “gender variant” community practices, prefiguring gender-as-diversity in their clothing, body hair, pronouns, self-descriptors, and intimate and sexual relationships (Mackay 2019). This form of prefiguration is striking in breathing life *into* gender rather than away from it. It also suggests a different kind of relationality. Moving away from a binary framework of contrasting genders to one of multiple genders foregrounds gender’s capacity to develop and be expressed in ways that do not depend on inversion or reversal (where woman is everything man is not, and vice versa). It also recognises that new, not yet imaginable, categories and ways of doing gender will emerge, as what gender means continues to evolve, both in its substance

⁴² A different feminist enactment of a hoped-for future appears in Sarah Browne and Jesse Jones’ workshop performance piece. It presents a “postpatriarchal archive” of objects that have become “ideologically obsolete” in the future that they wittily anticipate; <http://www.sarahbrowne.info/work/burn-in-flames/>; last accessed 25 February 2019.

and in the dimensions of life to which gender is tied -- as gender's depiction as an expressive language of social and personal action becomes more pertinent.

Yet, describing the manifestation of non-normative genders as prefigurative is not wholly unproblematic. Aside from some feminists' concerns about gender's salvaging, two interconnected lines of criticism emerge. The first suggests that gender is not being *prefigured* as plural and diverse; for this simply expresses what gender truly *is*. From this perspective, it is others' claim that there are only two genders that is the mistaken or fanciful one. Identifying gender as diverse and mutable, however, can be seen as prefigurative without this implying that such gender enactments are less authentic than more conventional variants. The "as if" quality of prefiguration does not have to mean acting as if particular "fictive" genders were real *while "knowing" that they are not*, for this would solidify a conservative account of what gender *really is*. Rather, it means enacting sought-after changes as if they can be carried by society as it is. In other words, the "as if" quality of prefiguration goes to the wider social environment, and its readiness to treat non-dominant genders as liveable.

Yet, even if diverse genders are not treated as fictive, a second line of criticism emerges. This worries that non-normative genders are being taken up as tropes or figures of a future-oriented politics, where minority genders become appropriated as the emblems of what gender could become.⁴³ This criticism becomes particularly acute when minority genders are celebrated for, and so expected to demonstrate, constant fluidity and flux. Queer expectations of gender being endlessly in motion have been criticised for seeming to dismiss the interests, needs, and social experiences of

⁴³ For instance, see one written response to the Transgender Equality Inquiry, 18 August 2015: "If passports were to have an 'other' or 'x' category, it would offer official recognition of my gender identity and help me to be confirmed by others in my gender identity. This would radically relieve the everyday anxiety of living a non-binary gender." <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19360.pdf>

currently precarious subjects, placing future imaginaries of the unimaginable above present-day concerns (see also Butler interviewed in Ahmed 2016b: 490-1). Yet, while recognising the importance of this criticism, can there still be a space for an exploratory, experimental gender politics?

Prefigurative politics in recent years has become more open-ended and contingent, aware that the better future constitutes a fluctuating aspiration of the evolving present not a stable and knowable real time outside present-day constraints (see also Jameson 1982). This version of prefiguration emphasises invention; but, when it comes to gender, can a curious anti-hegemonic ethics coexist with one of identity-affirmation? The tension between representing (or establishing) a particular desired outcome and constantly destabilising what is runs through much contemporary utopian thinking.⁴⁴ Fredric Jameson (1977: 16) describes the “tension, profoundly characteristic of all Utopian discourse, between description and narrative, between the effort of the text to establish the coordinates of a stable geographical entity, and its other vocation as sheer movement and restless displacement, as itinerary and exploration and, ultimately, as event.”⁴⁵

The drive for institutional recognition and the influence of law reform processes over the gender discourses that prevail has led both GDom and GDiv to minimise the value and legitimacy of more playful, exploratory, ill-disciplined conceptual lines. In part this may be because institutional take-up, especially by law, depends on needs being presented (and accepted) as serious and weighty.

⁴⁴ Gender as diversity can be both destabilising and affirming. Nordmarken (2014) describes the early sensation of exhilaration from transitioning into a more masculine-perceived form of embodiment as it generated confusion among others. At the same time, Nordmarken’s account evocatively describes the growing fatigue and experienced intrusiveness from relentless attention (41).

⁴⁵ See also Preciado (2008) on “gender-copyleft tactics”, taking up our techno-bodies to multiply possibilities for doing sex/ gender as a public or commoning practice. “Gender-copyleft tactics should be subtle but determinant: the future of sex and the open gender of the species is at stake. There should not be one single name that can be patented. It will be our responsibility to remove the code, to open political practices, to multiply possibilities.”

In part, it may be because law reform processes privilege conceptual lines that have conventional resonance and currency -- those that can align themselves with discourses of human rights, freedom, unchosen immutable conditions and vulnerability, for instance.⁴⁶ Yet, adopting an open-ended, exploratory approach to gender does not have to be at the expense of supporting and affirming dissident gender enactments. Utopian approaches are helpful here in emphasising the value of several simultaneous moves: of attending to the interests, concerns and subjectivities of the present, of imagining -- across different temporal and spatial scales -- other ways of living, and of treating the creation of new futures as an undetermined, open realm of possibility (see Levitas 2013; Sargisson 2012).⁴⁷

Making room for critical conceptions of gender

Conceptions of gender that make room for experimenting with the “not yet” and the “not sure” constitute one supplementary conceptual approach. A second returns us to the critical ethos of GDom. Critical accounts of gender as-it-is are vital to a utopian politics of gender. Conceptual prefiguration may involve acting as if meanings are (and could be) otherwise, but it is important not to lose the double character of the “as if” – on the one hand manifesting desired or preferred meanings; on the other, recognising that these meanings may not in fact prevail (see also Swain 2019). This means recognising those other conceptual cuts and joins that illuminate social life and are actualised as part of it. New gender meanings, as GDiv demonstrates, draw attention to specific

⁴⁶ See for instance, the discussion in *Pink News* in relation to the consultation on the GRA, Sascha Amel-Kheir, ‘Gender Recognition Act reform: I’m non-binary and this is why I need your help’, *Pink Paper*, 9 October 2018; <https://www.pinknews.co.uk/2018/10/09/gender-recognition-act-reform-im-non-binary-and-this-is-why-i-need-your-help/>; last accessed 25 February 2019. See also Nick Duffy, ‘Metro newspaper runs full-page ad attacking transgender rights reforms’, *Pink News*, 10 October 2018; <https://www.pinknews.co.uk/2018/10/10/metro-newspaper-full-page-ad-attacking-transgender-reforms/>; last accessed 25 February 2019.

⁴⁷ For further discussion on the temporary and contingent character of identity attachments, see Hall (1996: 6); also Lehtonen (2018: 158-9). In line with thinking about “critical utopias” (Moylan 1986), this emphasises the importance of critical reflexivity in relation to even seemingly progressive developments.

harms, including previously unattended to ones. But other kinds of gender harms, including those that feminists have long identified and analysed (involving resources, opportunities, the organisation of time and care-work, violence, sexual exploitation, and economic and political power), may require different conceptual lines. So too may accounts of the divisions and organisation of institutional and social life. Feminist work over several decades has explored the gendering of law, institutions, spaces, language and multiple other fields (e.g., see Beckwith 2005; Smart 1992). Feminists argue that these are gendered, but the accounts of gender being deployed do not start (or, rather, do not have to start) with group-based or subject-oriented accounts of men and women. Instead, gender is conceptualised through, and as giving rise to, regimes, systems, institutions, discourses, actor-networks and organising principles (e.g., Cooper 2004; Lagesen 2012; Lorber 2000; Martin 2004; Pascall and Lewis 2004; Walby 1990, 2007).

There is no single right answer to the question of whether gender should be understood as a process that shapes all aspects of social life or whether it should be understood more narrowly – for instance, as the category distinctions that define and emanate from sex-based differentiation. But in assessing whether gender should be conceptualised expansively or narrowly -- recognising that the former may require chains of (historic) association to link gender to areas of life (rationality, affect, privacy, war etc.,) beyond its own limited terms -- does the task make a difference? Do we need different conceptions of gender when it comes to affirming difference, destabilising new forms of settledness and critically understanding the status quo? Typically, critical analyses of the present read social concepts expansively in terms of their reach and scope in order to highlight embedded and formative processes. As Joan Acker (1992: 565) remarks, “Rather than being a specialized area within an accepted domain, gender is the patterning of difference and domination through distinctions between women and men *that is integral to many societal processes*” (emphasis added). This

makes gender (or related concepts, such as race) less easy to extract -- practically or analytically -- as discrete social forms. Adopting an expansive and enmeshed approach to the conceptual character of inequality means equality cannot be attained (or only a thin form of equality would be attained) by simply redistributing goods, dangers, responsibilities, and freedoms *between groups* without touching more systemic processes. Critical conceptions also tend to draw strong ontological lines around key sites or subjects to emphasise inequalities of power and intensities of harm. Whether in relation to the state, capitalism, gender or other powerful forces of injustice, the critical tendency is not to foreground variation, countervailing exercises of power, or the capacity for creative agency where this undermines the force of the argument in terms of demonstrating what is wrong and at stake.

When it comes to critique, this conceptual clarity is effective, but for other uses, it has limits. As Gibson-Graham (1996) have influentially argued in relation to the economy, supporting and growing new progressive alternatives benefits from conceptions that make room for existing diversity (that refuse, in their case, to treat capitalism as overpowering and all-pervasive). The proposal of this article, however, is not that a conception of gender attuned to domination should be replaced with one attuned to diversity, nor to replace a conception attuned to critique with one attuned to prefiguration or to experimentation; but, rather, to find ways of sustaining incommensurate progressive conceptions, attuned to different tasks. This, however, begs a difficult question: can clashing conceptions be sustained *in fruitful relation to each other*. This is an important question for a range of left projects, where the conceptual terms that support critique may not be the ones that support experimentation or hopeful notions of progress. I do not have the space here to address this question in any detail, but I want to briefly sketch one possible response involving two lines of thought. First, where might we find resources to help think about relations of fruitful coexistence, including through productive tension, rather than just relations of hostile antagonism?

Second, what does this plurality entail when it materialises in particular social spaces and sites, including state institutions and law?

In thinking about the first, of conceptual neighbourliness or contact, legal pluralism offers a helpful framework. Legal pluralism addresses how different forms of state and non-state law interact. While it recognises state law is usually the more powerful framework, its focus is on mutual relations of borrowing, parallel (isomorphic) forms of rule, the delegation or seizing of authority and power, bridging figures, and the evolving, complex interpenetration and connections between different legal orders (e.g., see Cooper 2019; Griffiths 1986; Melissaris 2004; Merry 1988). Applied to gender's contrasting conceptual lines, exploring these different elements -- from a starting point that assumes plurality rather than unity -- opens up forms of interaction beyond antagonism or mutual disregard. Taking the two conceptions of GDom and GDiv, centred in this discussion, might mean exploring what they take from each other, the figures and institutions that force conflict but might also act as communicative bridges, the social conditions that underpin their differential power and influence, and the distributive allocation of their autonomy -- recognising the different domains where they each might "make better sense". What then does this mean for law?

The assumption of many law reformers is that legislative use of a concept needs to be consistent – that gender (or sex) must mean the same thing across law's different fields. If this is the case, the stakes are high. As one women's organisation wrote, in response to the Scottish government's consultation on the GRA: "For a government to seek to abolish the common understanding of man and woman without any explanation, never mind involvement of, its citizens cannot be right. It cannot be right to infer that human beings are not sexually dimorphic, that there

may be in fact 3 sexes (and why just 3?) without any evidence.”⁴⁸ Legally recognising gender as a deeply personal aspect of identity – whether divided into three categories or two -- seems to undermine attempts to experiment with gender or to unsettle and craft new gender meanings. It also seems to undermine accounts of gender as systemic domination. Of course, this presupposes that state law has the power to determine what gender could come to mean or, at least, to assert an authoritative account. Legally pluralist, contextual and actor-network approaches to law dispute the normative force of state declarations (e.g., see Davies 2017a). At the same time, to the extent that institutions, such as state law, participate in giving force and authority to particular discursive accounts or rationalities, there may be good reason to try and sustain plural conceptual lines, recognising the inevitability of different legal “language games” when it comes to gender (Davidson and Smith 1999).

As a deliberate legislative undertaking, conceptual plurality can be sustained (or introduced) in different ways (see also Clarke 2015). State law might insulate legislative fields from each other, draw on different interpretive frameworks within different legal areas, use overlapping but distinct terms (sex *and* gender, for example), devolve authority for gender-based decisions (to bodies working with different gender accounts), legislate policies that don’t rely on gender’s explicit naming or definition (for instance, in relation to welfare, taxation, immigration, low pay, collective property rights and public space); and advance substantive principles and norms that decentre the middle-class, white, male, able-bodied subject. Each of these moves raises complex questions. What is important for my discussion here is that legal conceptual plurality is recognised rather than denied. Margaret Davies (2006) has very helpfully explored the presence of plurality *within* state law,

⁴⁸ Women’s Spaces in Scotland response to the Scottish consultation on the GRA; <https://www.gov.scot/Resource/0053/00539506.pdf>; last accessed 25 February 2019.

including the common law. The challenge of the analysis presented here is whether, and how, legislative reform might engage explicitly with different gender conceptual lines, rather than treating inconsistency as a source merely of unwelcome confusion (see also Cooper 2019; Davies 2008: 288, 2017a, b; Naffine 2009).

Conclusion

This article has explored the challenge of creating new conceptual lines for gender in conditions of conflict, where what gender is and means are in dispute. In Britain, currently, different gender projects challenge different gender harms, seek to create different hopeful futures, and worry over different approaching dystopias, as they advance radically different accounts of gender and its categories – of how people are gendered and what their gender means. Such divergences are not uncommon. In this context, different conceptions might have been able to coexist along separate normative planes. However, this coexistence came under pressure as state, law and institutional bodies, such as the Labour Party, became the sites through which a struggle for gender's conceptual future took place.

This article has sought to elucidate some of the key tensions and issues at stake. However, it is also intended as an intervention, taking up the contemporary struggle to define gender as a way into wider questions about conceptual plurality. Too often social and political forces seek to impose a single definition – whether of the state, law, capitalism or gender. Yet, this article suggests that different conceptions, even within critical and progressive spaces, are inevitable and can be valuable, since they reflect the different uses and purposes to which concepts are put. While other work on concepts focuses on divergent conceptions arising from epistemology, political ideology, ontology, and methodology, this article has focused on the divergence between political projects of critique,

affirmation, prefiguration, and experimentation. These different political moves are often set against each other as if one was the best way forward. Drawing on utopian writing, this article has argued for their interconnected coexistence. In such conditions, the challenge becomes how to develop modes of conceptual neighbourliness and connection so that conceptual lines, attuned to different political tasks, strengthen the momentum for progressive transformation rather than undermining or destroying it.

References

- Acker, Joan. 1992. "From sex roles to gendered institutions". *Contemporary Sociology* 21 (5): 565-569.
- Ahmed, Sara. 2016a. "An affinity of hammers". *Transgender Studies Quarterly* 3 (1-2): 22-34.
- . 2016b. "Interview with Judith Butler". *Sexualities* 19 (4): 482-92.
- Beckwith, Karen. 2005. "A common language of gender?" *Politics & Gender* 1 (1): 128-137.
- Browne, Kath. 2009. "Womyn's separatist spaces: Rethinking spaces of difference and exclusion". *Transactions of the Institute of British Geographers* 34 (4): 541-56.
- Butler, Judith. 2004. *Undoing gender*. London: Routledge.
- . 2015. *Notes toward a performative theory of assembly*. Cambridge, MA: Harvard University Press.
- Carby, Hazel. 2007. "White woman listen! Black feminism and the boundaries of sisterhood". *CCCS selected working papers* (pp. 110-128). London: Routledge.
- Chang, Tiffany K., and Y. Barry Chung. 2015. "Transgender microaggressions: Complexity of the heterogeneity of transgender identities". *Journal of LGBT Issues in Counseling* 9 (3): 217-234.
- Clarke, Jessica A. 2015. "Identity and form". *California Law Review* 103 (4): 747-839.
- . 2019. "They, them, and theirs". *Harvard Law Review* 132 (3): 894-991.
-

Connell, Robert W., and James W. Messerschmidt. 2005. "Hegemonic masculinity: Rethinking the concept". *Gender & Society* 19 (6): 829-859.

Cooper, Davina. 2004. *Challenging diversity: Rethinking equality and the value of difference*. Cambridge: Cambridge University Press.

———. 2014. *Everyday utopias: The conceptual life of promising spaces*. Durham, NC: Duke University Press.

———. 2017. "Prefiguring the state". *Antipode* 49 (2): 335-56.

———. 2019. *Feeling like a state: Desire, denial and the recasting of authority*. Durham, NC: Duke University Press.

Cooper, Davina, and Flora Renz. 2016. "If the state decertified gender, what might happen to its meaning and value?" *Journal of Law and Society* 43 (4): 483-505.

Davidson, Joyce, and Mick Smith. 1999. "Wittgenstein and Irigaray: Gender and philosophy in a language (game) of difference". *Hypatia* 14 (2): 72-96.

Davies, Margaret. 1994. "Feminist appropriations: Law, property and personality". *Social & Legal Studies* 3 (3): 365-391.

———. 2006. "Pluralism and legal philosophy". *Northern Ireland Legal Quarterly* 57: 577-596.

———. 2008. "Feminism and the flat law theory". *Feminist Legal Studies* 16 (3): 281-304.

———. 2017a. "Plural pluralities of law". In Nicole Roughan and Andrew Halpin (Eds.), *In pursuit of pluralist jurisprudence* (pp. 239-260). Cambridge: Cambridge University Press.

———. 2017b. *Law unlimited*. London: Routledge.

Derrida, Jacques. 1992. *Given time: I. counterfeit money* (Trans. Peggy Kamuf). Chicago: University of Chicago Press.

———. 2000. "Hostipitality". *Angelaki: Journal of Theoretical Humanities* 5 (3): 3-18.

———. 2001. "A discussion with Jacques Derrida". *Theory & Event* 5 (1).

Derrida, Jacques, and Anne Dufourmantelle. 2000. *Of hospitality*. Stanford: Stanford University Press.

Doan, Petra L. 2010. "The tyranny of gendered spaces—reflections from beyond the gender dichotomy". *Gender, Place & Culture* 17 (5): 635-54.

Fenstermaker, Sarah, and Candace West. 2013. *Doing gender, doing difference: Inequality, power, and institutional change*. New York: Routledge.

Gallie, Walter Bryce. 1955. "Essentially contested concepts". *Proceedings of the Aristotelian Society*. 56: 167-198.

Gamson, Joshua. 1997. "Messages of exclusion: Gender, movements, and symbolic boundaries". *Gender & Society* 11 (2): 178-99.

Garver, Eugene. 1990. "Essentially contested concepts: The ethics and tactics of argument". *Philosophy & Rhetoric* 23 (4): 251-70.

Gibson-Graham, G. K. 1996. *The end of capitalism (as we knew it)*. Oxford: Blackwell.

Griffiths, John. 1986. "What is legal pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18 (24): 1-55.

Halberstam, Judith and Jack. 1998. *Female masculinity*. Durham, NC: Duke University Press.

Hale, Jacob. 1996. "Are lesbians women?" *Hypatia* 11 (2): 94-121.

Hall, Stuart. 1996. "Introduction: Who needs identity?" In Stuart Hall and Paul du Gay (Eds.), *Questions of cultural identity* (pp. 1-17). London: Sage.

Hamlin, Alan, and Zofia Stemplowska. 2012. "Theory, ideal theory and the theory of ideals". *Political Studies Review* 10 (1): 48-62.

Haugaard, Mark. 2010. "Power: A 'family resemblance' concept". *European Journal of Cultural Studies* 13 (4): 419-38.

Holzer, Lena, 2018. *Non-binary gender registration models in Europe: Report on third gender marker or no gender marker options*. ILGA-Europe.

Hutton, Christopher. 2017. "Legal sex, self-classification and gender self-determination". *Law and Humanities* 11 (1): 64-81.

-
- Jameson, Fredric. 1977. "Of islands and trenches: Naturalization and the production of utopian discourse". *Diacritics* 7 (2): 2-21.
- . 1982. "Progress versus utopia; or, can we imagine the future?" *Science Fiction Studies* 9 (2): 147-58.
- Jeffreys, Sheila. 2014. "The politics of the toilet: A feminist response to the campaign to 'degender' a women's space". *Women's Studies International Forum* 45: 42-51.
- Katyal, Sonia K. 2017. "The numerus clausus of sex". *University of Chicago Law Review* 84 (1): 389-495.
- Lagesen, Vivian Anette. 2012. "Reassembling gender: Actor-network theory (ANT) and the making of the technology in gender". *Social Studies of Science* 42 (3): 442-448.
- Lehtonen, Aura. 2018. *The sexual and intimate life of UK austerity politics*. PhD Dissertation, The London School of Economics and Political Science.
- Levitas, Ruth. 2013. *Utopia as method: The imaginary reconstitution of society*. London: Palgrave Macmillan.
- Linstead, Stephen, and Alison Pullen. 2006. "Gender as multiplicity: Desire, displacement, difference and dispersion". *Human Relations* 59 (9): 1287-1310.
- Lombardi, Emilia L., Riki Anne Wilchins, Dana Priesing, and Diana Malouf. 2002. "Gender violence: Transgender experiences with violence and discrimination". *Journal of Homosexuality* 42 (1): 89-101.
- Lorber, Judith. 2000. "Using gender to undo gender: A feminist degendering movement". *Feminist Theory* 1 (1): 79-95.
- Lugones, María. 2007. "Heterosexualism and the colonial/modern gender system". *Hypatia* 22 (1): 186-219.
- Mackay, Finn. 2019. "No woman's land? Revisiting border zone denizens". *Journal of Lesbian Studies* (online) 1-13.
- MacKinnon, Catharine A. 1987. *Feminism unmodified: Discourses on life and law*. Cambridge, MA: Harvard University Press.
- Maeckelbergh, Marianne. 2011. "Doing is believing: Prefiguration as strategic practice in the alterglobalization movement". *Social Movement Studies* 10 (1): 1-20.
-

- Martin, Patricia Yancey. 2004. "Gender as social institution". *Social Forces* 82 (4): 1249-1273.
- Melissaris, Emmanuel. 2004. "The more the merrier? A new take on legal pluralism". *Social & Legal Studies* 13 (1): 57-79.
- Merry, Sally Engle. 1988. "Legal pluralism". *Law and Society Review* 22 (5): 869-896.
- Moylan, Tom. 1986. *Demand the impossible: Science fiction and the utopian imagination*. New York: Methuen.
- Munro, Vanessa. 2006. "Resemblances of identity: Ludwig Wittgenstein and contemporary feminist legal theory". *Res Publica* 12 (2): 137-162.
- Naffine, Ngaire. 1998. "The legal structure of self-ownership: Or the self-possessed man and the woman possessed". *Journal of Law and Society* 25 (2): 193-212.
- . 2009. *Law's meaning of life: Philosophy, religion, Darwin and the legal person*. London: Bloomsbury Publishing.
- Namaste, Viviane. 2009. "Undoing theory: The 'transgender question' and the epistemic violence of Anglo-American feminist theory". *Hypatia* 24 (3): 11-32.
- Nicholson, Linda. 1994. "Interpreting gender". *Signs* 20 (1): 79-105.
- Nordmarken, Sonny. 2014. "Becoming ever more monstrous: Feeling transgender in-betweenness". *Qualitative Inquiry* 20 (1): 37-50.
- Pascall, Gillian, and Jane Lewis. 2004. "Emerging gender regimes and policies for gender equality in a wider Europe". *Journal of Social Policy* 33 (3): 373-94.
- Preciado, Beatriz. 2008. "Pharmaco-pornographic politics: Towards a new gender ecology". *Parallax* 14 (1): 105-117.
- Reitan, Eric. 2001. "Rape as an essentially contested concept". *Hypatia* 16 (2): 43-66.
- Roseneil, Sasha. 2000. *Common women, uncommon practices: The queer feminisms of Greenham*. London: Continuum.
- Sargisson, Lucy. 2012. *Fool's gold? Utopianism in the twenty-first century*. Basingstoke: Palgrave Macmillan.
-

Schilt, Kristen, and Laurel Westbrook. 2015. "Bathroom battlegrounds and penis panics". *Contexts* 14 (3): 26-31.

Schilt, Kristen, and Matthew Wiswall. 2008. "Before and after: Gender transitions, human capital, and workplace experiences". *The BE Journal of Economic Analysis & Policy* 8 (1): online.

Schippers, Mimi. 2007. "Recovering the feminine other: Masculinity, femininity, and gender hegemony". *Theory and Society* 36 (1): 85-102.

Shrage, Laurie. 2012. "Does the government need to know your sex?" *The Journal of Political Philosophy*. 20 (2): 225-247.

Smart, Carol. 1992. "The woman of legal discourse". *Social & Legal Studies* 1 (1): 29-44.

Spade, Dean. 2011. *Normal life: Administrative violence, critical trans politics, and the limits of law*. Boston: South End Press.

Stachowiak, Dana M. 2017. "Queering it up, strutting our threads, and baring our souls: Genderqueer individuals negotiating social and felt sense of gender". *Journal of Gender Studies* 26 (5): 532-43.

Stone, Alison. 2004. "Essentialism and anti-essentialism in feminist philosophy". *Journal of Moral Philosophy* 1 (2): 135-53.

Swain, Dan. 2019. "Not not but not yet: Present and future in prefigurative politics". *Political Studies* 67 (1): 47-62.

Tudor, Alyosxa. 2019. "Im/possibilities of refusing and choosing gender". *Feminist Theory* (forthcoming).

Valentini, Laura. 2012. "Ideal vs. non-ideal theory: A conceptual map". *Philosophy Compass* 7 (9): 654-64.

Walby, Sylvia. 1990. *Theorizing patriarchy*. Oxford: Basil Blackwell.

-----, 2007. "Complexity theory, systems theory, and multiple intersecting social inequalities". *Philosophy of the Social Sciences* 37 (4): 449-470.

Wipfler, Anna James. 2016. "Identity crisis: The limitations of expanding government recognition of gender identity and the possibility of genderless identity documents". *Harvard Women's Law Journal* 39: 491-554.

Wittgenstein, Ludwig. 2009 [1953]. *Philosophical investigations*. Chichester: John Wiley & Sons.

Wittig, Monique. 1992. *The straight mind and other essays*. Beacon Press.

Yates, Luke. 2015. "Rethinking prefiguration: Alternatives, micropolitics and goals in social movements". *Social Movement Studies* 14 (1): 1–21.